Question of removal
Affirmed by a divided court
335
Jan. 11. 1881
Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 860.

GEORGE BATY BLAKE, ARTHUR W. BLAKE, AND JOSEPH E. BROWN, EXECUTORS OF GEORGE BATY BLAKE, DECEASED, PLAINTIFFS IN ERROR,

vs.

JOHN W. McKIM, JUDGE OF THE PROBATE COURT FOR THE COUNTY OF SUFFOLK, MASSACHUSETTS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED SEPTEMBER 15, 1880.

Post office Exhibit

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INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	1
Writ	5	2
Officer's return endorsed on writ	6	3
Declaration	7	3
Copy of bond to probate judge	9	4
Appearance	11	4
Answer	12	5
Claim for jury trial	14	6
Petition for removal to circuit court	14	6
Bond accompanying petition for removal	16	6
Plaintiff's objection to removal	18	7
Order of supreme judicial court on petition for removal	19	8
Plaintiff's petition to remand cause to State court	19	8
Motion to amend writ	20	8
Agreed statement of facts	21	9
Order of circuit court remanding cause to supreme judicial court	22	9
Bill of exceptions	22	10
Clerk's certificate	25	10
Bond on writ of error	27	11
Citation	29	12

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because in the record and proceedings, as also in the rendition of an order remanding the cause from said circuit court to the supreme judicial court for the county of Suffolk and commonwealth of Massachusetts, before you, between John W. McKim, of Boston, in the commonwealth of Massachusetts, judge of the probate court in and for the county of Suffolk, in said commonwealth, plaintiff, and George Baty Blake, of said Boston, Arthur W. Blake of Brookline, in said commonwealth, and Joseph E. Brown, of the city, county, and State of New York, executors of the will of George Baty Blake, late of said Brookline, deceased, defendants, in an action of contract, a manifest error hath happened to the great damage of the said defendants as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the third day of April, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.]

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—

T. L. NELSON,
U. S. Dist. Judge.

2 Circuit court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States as within commanded.

In testimony whereof, I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this third day of September, A. D. 1880.

[SEAL.]

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Wednesday the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-nine, before the honorable Thomas L. Nelson, district judge.

JOHN W. MCKIM, OF BOSTON, IN THE COUNTY of Suffolk, in the commonwealth of Massachusetts, judge of the probate court in and for said county of Suffolk, plaintiff,
v.
GEORGE BATY BLAKE, OF SAID BOSTON, ARthur W. Blake, of Brookline, in said commonwealth, and Joseph E. Brown, of the city, county, and State of New York, executors of the will of George Baty Blake, late of said Brookline, deceased, defendants.

In an action of contract.

The writ in this cause is dated the fifteenth day of November, A. D. 1877, and is made returnable before the justices of the supreme judicial court of the commonwealth of Massachusetts, then next to be holden at Boston, within and for the county of Suffolk, on the first Tuesday of April, 1878. The defendants filed their petition in said supreme judicial court to remove this cause to this circuit court, and having given bond in said supreme judicial court for entry of cause in this court *court*, entered the same here at the October term, A. D. 1878, when and where the parties appeared by their respective attorneys.

Upon the entry of said cause in this circuit court attested copies were filed of the following nine papers on file in the said supreme judicial court, namely: 1, writ, with officer's return thereon endorsed; 2, plaintiff's declaration; 3, appearance of George B. Blake and Arthur W. Blake, two of the defendants; 4, defendants' answer; 5, claim for jury trial; 6, petition for removal of suit to circuit court; 7, bond accompanying petition for removal; 8, plaintiff's objection to removal; 9, order of supreme judicial court on petition for removal; which said attested copies are in the words and figures following:

Writ.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To the sheriff of our several counties or their deputies, greeting:

We command you to attached the goods or estate of George Baty Blake, of Boston, in our said county of Suffolk, and Arthur W. Blake and Joseph E. Brown, both of the city, county and State of New York, executors of the will of George Baty Blake, late of Brookline, in the county of Norfolk, deceased, to the value of fifty thousand dollars, and summon the said executors (if they may be found in your precinct) to appear before our justices of our supreme judicial court, next to be holden at Boston, within and for our said county of Suffolk, on the first

Tuesday of April next, then and there in our said court to answer unto
John W. McKim, esquire, of said Boston, judge of the probate
6 court in and for our said county of Suffolk, in an action of contract, to the damage of the said plaintiff (as he says) the sum of fifty thousand dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein.

Witness, Horace Gray, esquire, at Boston, the fifteenth day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] JOHN NOBLE, *Clerk.*

A true copy. Attest:

JOHN NOBLE, *Clerk.*

Officer's return indorsed on writ.

SUFFOLK, *ss:* BOSTON, *November 16th*, 1877.

By virtue of this writ, I this attached a chip as the property of the within named George Baty Blake, executor, and left an attested copy of this writ with a summons at his *his* last and usual place of above for his appearance to answer at court.

On the 23d day of January, A. D. 1878, I attached a chip as the property of the within named Arthur W. Blake and Joseph J. Brown, executors, and gave to said Arthur W. a summons with an attested
7 copy of this writ for his appearance to answer at court. Said Joseph E. Brown, not being an inhabitant of or resident in this commonwealth and he having no last and usual place of abode therein, by direction of pl'ff's att'y, I gave Benj. F. Brooks, esq., a summons with an attested copy of this writ, as the att'y of said Brown, for appearance at court.

HAMM MERRILL,
Deputy Sheriff.

Fees: Service & travel, 1.58; copies, 3.00—$4.58.

COUNTY OF SUFFOLK, *ss:*

James C. Davis, for and in behalf of the plaintiff in this writ, before the service thereof, on oath declares that he verily believe the matter sought to be recovered in the action hereby commenced actually equals, in amount or value, the sum of four thousand dollars.

JAMES C. DAVIS.

Subscribed and sworn to, this sixteenth day of November, A. D. 1877, before me.

ALONZO B. WENTWORTH,
Justice of the Peace.

Plaintiff's declaration.—Filed in the supreme judicial court April 2, 1878.

And the plaintiff says that the said George Baty Blake, of Brookline,
of whose will the defendants are executors, together with one
8 James M. Howe and one Estes Howe, executed to Edward G. Loring, esquire, judge of the probate court of the county of Suffolk, a bond, a copy whereof is hereto annexed.

And the plaintiff says that he is the successor in office of the said Edward G. Loring.

And the plaintiff says that the said James M. Howe did not dispose

of and manage the estate and effects which came into his possession as trustee under the will of Henry Todd for the use of Mary C. Washburn, formerly Mary C. Todd, and Julia Todd, and faithfully discharge his trust in relation thereto according to law and the will of the said testator, and did not render accounts, on oath, of the property in his hands as such trustee, and of the management and disposition thereof, when required by the judge of the said probate court.

Also, that the said James M. Howe, at sundry times after the said bond had been executed and approved by the said probate court, and before the 17th day of May, 1869, wilfully and fraudulently misappropriated and converted to his own use all the personal estate, securities and effects held by him as such trustee, the said personal estate,
9 securities, and effects being of the value of fifty thousand dollars.

By JAMES C. DAVIS,
Plaintiff's Attorney.

Know all men by these presents, that we, James M. Howe, banker, as principal, Geo. B. Blake, banker, as surety, both of Brookline, in the county of Norfolk, & Estes Howe, of Cambridge, in the county of Middlesex, physician, also as surety, all in the commonwealth of Massachusetts, are holden and stand firmly bound and obliged unto Edward G. Loring, esquire, judge of the probate of wills and for granting administration within the county of Suffolk, in the sum of fifty thousand dollars, to be paid to said Loring and his successors in the said office, to the true payment whereof we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals. Dated the thirtieth day of April, in the year of our Lord one thousand eight hundred and fifty-five.

The condition of this obligation is such that whereas you, the said James M. Howe, have been duly appointed trustee (in the place of
10 Thomas P. Cushing, deceased), under the last will of Henry Todd, late of Boston, in said county of Suffolk, deceased, of certain estate given in said will in trust for the use of Mary C. Todd, now Mary C. Washburn, and Julia Todd: Now therefore if the said James M. Howe—

First. Shall make a true inventory of all the real estate, and all the goods, chattels, rights, and credits belonging to him as trustee, and which shall come to his possession or knowledge, and shall return the same into the probate court for the said county of Suffolk within three months, the said judge of probate having so ordered.

Secondly. Shall dispose of and manage all such estate and effects, and shall faithfully discharge his trust in relation thereto according to law and the will of said testator.

Thirdly. Shall render an account, on oath, of the property in his hands, and of the man'gement and disposition thereof within one year, and at any other times when required by the said judge of probate; and

Fourthly. At the expiration of his trust shall settle his accounts with the said judge of probate, and shall pay over and deliver all the
11 estate and effects remaining in his hands or due from him on such settlement to the person or persons who shall be entitled thereto according to law and the will of the testator, then the above

written obligation shall be void and of no effect; otherwise shall remain in full force.

JAMES MURRAY HOWE. [L. S.]
GEO. BATY BLAKE. [L. S.]
ESTES HOWE. [L. S.]

Signed, sealed and delivered in presence of—
GEO. O. HARRIS.
J. P. MARQUAND.

SUFFOLK, *ss:*

At the court of probate holden at Boston in said county of Monday, the thirtieth day of April, in the year 1855, I have examined and do approve of the foregoing bond, and order the same to be recorded in the probate office.

EDW. G. LORING,
Judge of Probate Court.

Examined:

WM. C. BROWN, *Reg.*

A true copy. Attest:

JOHN NOBLE, *Clerk.*

Appearance.—Filed in supreme judicial court April 12, 1878.

Please enter our appearance for George B. Blake and Arthur W. Blake, two of the defendants in the above entitled case.

BROOKS, BALL & STOREY, *Att'ys.*

12 A true copy. Attest:

JOHN NOBLE, *Clerk.*

Defendants' answer.—Filed in supreme judicial court May 2, 1878.

And now come the defendants in the above entitled case, and for answer say that they have been informed and believe, but have no personal knowledge, that George Baty Blake, their testator, with Estes Howe, signed a bond as sureties for James Murray Howe, but whether the copy annexed to the plaintiff's declaration is a true copy of said bond these defendants are ignorant, so that they can neither admit nor deny the same, but leave the plaintiff to prove the same if true; and these defendants, further answering, deny each and every allegation in the plaintiff's writ and declaration contained.

And the defendants further answering say that said George Baty Blake, the defendants' testator, on his petition to the probate court for said county of Suffolk, to be discharged from all further responsibility upon said bond, was on the seventeenth day of May, A. D. eighteen hundred and sixty-nine, duly discharged by said probate court from all further responsibility on the said bond.

13 And these defendants, further answering, say that said James Murray Howe, said Estes Howe, Mary C. Washburn, Julia Todd, and Mary C. Washburn, guardian of Henry T. Washburn and Frank J. Washburn (the said Mary C. Washbbrn, Julia Todd, and Henry T. Washburn and Frank. J. Washburn being the persons for whose benefit this suit was brought), requested in writing the said probate court to so discharge said George Baty Blake, the defendant's testator, without further notice.

And these defendants, further answering, say that if there ever was

any breach of the condition of said bond so signed by the defendants' testator or mentioned in the plaintiff's declaration, which these defendants deny, it was with the connivance, consent, and acquiescence of the said Mary C. Washburn, Julia Todd, and of said Mary C. Washburn, guardian as aforesaid, and all knowledge and information thereof or in respect thereto was concealed by them from the said George Baty Blake, the defendants' testator.

And these defendants, further answering, say that said James Murray Howe has never violated or refused to obey any order or decree
14 of said probate court, or in any manner violated the conditions or any of the conditions of said bond, but has kept and performed the same fully and in all respects.

And these defendants, further answering, say that said James Murray Howe, on said seventeenth day of May, gave to the judge of probate of said county, in place of said bond, a new bond as trustee under the last will of Henry Todd, late of Boston, in said county, deceased, with said Estes Howe and John Revere as sureties, which new bond was duly approved by said judge of probate on said seventeenth day of May.

BROOKS, BALL & STORY,
Def'ts' Att'ys.

A true copy. Attest:

JOHN NOBLE, *Clerk.*

Claim for jury trial.—Filed in supreme judicial court May 11, 1878.

And now come the defendants in the above-entitled action and give notice that they desire a trial by jury in said action.

By their attorneys, BROOKS, BALL & STOREY.

A true copy. Attest:

JOHN NOBLE, *Clerk.*

Petition for removal of suit to circuit court.—Filed in supreme judicial court Aug. 16, 1878.

15 To the honorable the justices of the supreme judicial court, now holden at Boston, within and for said county of Suffolk:

Respectfully represent unto your honors George Baty Blake, Arthur W. Blake, and Joseph E. Brown, executors of the will of George Baty Blake, late of Brookline, in the county of Norfolk, deceased, the defendants in the above-entitled suit, that said suit was returnable to and entered at the present April term of this court; that said Joseph E. Brown, one of the said defendants, was, when the above-entitled suit was commenced, and still is a citizen of the State of New York, and that said John W. McKim, the plaintiff in said suit, and Mary C. Washburn, Julia Todd, Henry T. Washburn and Frank I. Washburn, the parties at whose request and for whose benefit said suit was brought, were when suit was commenced and still are citizens of the commonwealth of Massachusetts; that the matter in dispute in said suit exceeds, exclusive of costs, the sum and value of five hundred dollars; that your petitioners desire to remove said suit from this court, where the same is now pending, to the circuit court of the United States for the district of Massasetts:

16 Wherefore your petitioners now, before the term at which said cause could be first tried, and before the trial thereof, come and pray that the above-entitled suit may be removed from this court into the circuit court of the United States for the district of Massachusetts, and have made and filed herewith a bond with good and sufficient surety,

conditioned as provided in section 3 of chapter 137 of the Statutes at Large of the United States of the year 1875.

GEORGE BATY BLAKE.
ARTHUR W. BLAKE.
JOSEPH E. BROWN.

BROOKS, BALL & STOREY,
Att'ys for Def'ts.

A true copy. Attest:

JOHN NOBLE, *Clerk.*

Bond accompanying petition for removal.—Filed in supreme judicial court August 16, 1878.

Know all men by these presents that we, George B. Blake, of Boston, in the county of Suffolk, Arthur W. Blake, of Brookline, in the county of Norfolk, both in the commonwealth of Massachusetts, and Joseph E. Brown, of the city, county, and State of New York, executors of the will of George Baty Blake, late of said Brookline, deceased, as principles, and George R. Harris, of Salem, Mass'tts, and D. H. Hayden, of Boston, as sureties, are holden and stand firmly bound unto
17 John W. McKim, esquire, judge of the probate court in and for the said county of Suffolk, in the sum of five hundred dollars, to the payment of which to the said John W. McKim, judge of said probate court, or his successors or assigns, we hereby jointly and severally bind ourselves, our heirs, executors, and administrators.

The condition of the obligation is such that whereas the said George B. Blake, Arthur W. Blake, and Joseph E Brown, executors as aforesaid, have simultaneously herewith filed their petition in the supreme judicial court for the said county of Suffolk, praying for the removal to the circuit court of the United States for the district of Massachusetts, of a certain suit in which said John W. McKim, judge as aforesaid, is plaintiff, and said George B. Blake, Arthur W. Blake, and Joseph E. Brown, executors as aforesaid, are defendants, entered at the present April term of said supreme judicial court for said county of Suffolk, and now pending therein:

Now, therefore, if the said George B. Blake, Arthur W. Blake, and Joseph E. Brown, executors as aforesaid, shall enter in said circuit court, on the first day of its next session, a copy of the record in said
18 suit, and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall be and remain in full force and virtue.

In witness whereof we hereunto set our hands and seals this sixteenth day of August, A. D. 1878.

GEORGE BATY BLAKE. [SEAL.]
ARTHUR W. BLAKE. [SEAL.]
JOSEPH E. BROWN. [SEAL.]
GEO. R. HARRIS. [SEAL.]
D. H. HAYDEN. [SEAL.]

Signed and sealed in presence of—
S. P. L. BLAKE to G. B. B.
GEO. R. HARRIS to A. W. B.
F. O. HARRIS to J. E. B.
GEO. C. WILDE to G. R. H.
E. C. HAYDEN to D. H. H.

A true copy. Attest:

JOHN NOBLE, *Clerk.*

Plaintiff's objection to removal.—Filed in supreme judicial court Oct. 7, 1878.

The plaintiff hereby objects to the removal of the above-entitled action to the U. S. circuit court, and denies the right of the defendants to remove the same, and asks to be heard thereon in this court.

By JAMES C. DAVIS,
Pl'ff's Att'y.

OCT. 7, 1878.

Copy. Attest:

JOHN NOBLE, *Clerk.*

19 *Order of supreme judical court on petition for removal.*

In the above-entitled case it is ordered that the petition of the defendants for the removal of said cause to the circuit court of the United States, for the district of Massachusetts, be disallowed.

By the court.

JOHN NOBLE, *Clerk.*

OCTOBER 15, 1878.

A true copy. Attest:

JOHN NOBLE, *Clerk.*

On the seventeenth day of October, 1878, the following petition to remand cause to State court was filed, namely:

Plaintiff's petition to remand cause to State court.—Filed in circuit court Oct. 17, 1878.

And now the plaintiff comes and avers that the defendants George B. Blake and Arthur W. Blake were, at the time of the filing of the defendants' petition in the supreme judicial court of Massachusetts for the removal of the above-entitled suit to this court, and at the time of the entry of said suit in this court, and still are, citizens of the commonwealth of Massachusetts, and that the said suit does not involve a dispute or controversy properly within the jurisdiction
20 of this court, and that the defendants are not entitled to remove the same to this court, wherefore the plaintiff prays that the said suit may be remanded to the said supreme judicial court, and that costs may be allowed to the plaintiff.

By JAMES C. DAVIS,
Plaintiff's Attorney.

OCTOBER 17, 1878.

This cause was thence continued to the May term of this court, A. D. 1879, when, on the thirteenth day of September, the following motion was filed and allowed by the court, namely:

Motion to amend writ.—Filed in circuit court September 13, 1879.

And now the plaintiff moves that the writ in the above-entitled cause may be amended by inserting therein, next after the names of Arthur W. Blake, the words "of Brookline, in our county of Norfolk," and by striking out the word "both" next after the name of Joseph E. Brown.

By JAMES C. DAVIS,
Plaintiff's Attorney.

This amendment may be allowed.

BROOKS, HALL & STOREY,
Def'ts' Att'ys.

This cause was thence continued to this present term, when the
21 following agreed statement of facts is filed, namely:

Agreed statement of facts on motion of plaintiff to remand to State court.

This is a motion to remand the above-entitled case from the circuit court of the United States for the district of Massachusetts to the supreme judicial court for the county of Suffolk and commonwealth of Massachusetts.

The facts are agreed to be as follows:

The above-entitled case is an action of contract in which John W. McKim, judge of the probate court in and for said county of Suffolk, is plaintiff and George Baty Blake, of Boston, in said county of Suffolk, Arthur W. Blake, of Brookline, in the county of Norfolk, in said commonwealth, and Joseph E. Brown, of the city, county, and State of New York, executors of the will of George Baty Blake, late of Brookline, in the county of Norfolk, in said commonwealth, deceased, are defendants, brought to recover the sum of fifty thousand dollars upon a probate bond upon which the defendants' said testator was a surety, said bond having been given by a trustee under the will of Henry Todd, late of said Boston, deceased, with condition for the faithful performance of his duties as such trustee, and the declaration alleges breaches of the said bond.

In said suit the writ was dated Nov. 15, 1877, and was returnable to and duly entered at the April term, 1878, of said supreme judicial court.

Said defendants appeared and filed their answer in said case and at said April term, 1878, of said supreme judicial court, being before the term at which said cause could be first tried; and before the trial thereof, said defendants made and filed their petition in said suit in said supreme judicial court for the removal of said suit into the said circuit court of the United States to be held in the district of Massachusetts, alleging that said Joseph E. Brown, one of said defendants, was, when said suit was commenced, and still is, a citizen of the State of New York; and that John W. McKim, the plaintiff in said suit, and Mary C. Washburn, Julia Todd, Henry T. Washburn, and Frank I. Washburn, the parties at whose request and for whose benefit said suit was brought, were when said suit was commenced, and still are, citizens of the commonwealth of Massachusetts, and alleging that the matter in dispute in said suit exceeds, exclusive of costs, the sum and value of $500; and said defendants made and filed therewith a bond with good and sufficient surety, conditioned as provided in sect. 3 of chap. 137 of the Statutes at Large of the United States of the year 1875, being the act of March 3, 1875. The plaintiff objected to said removal, and upon hearing said petition the said State court held that said suit did not come within the provisions of said act of March 3, 1875, and declined to allow said removal. Exceptions were taken to said ruling and filed, and the same are still pending, not having been argued.

22 The defendants thereupon, in accordance with the provisions of said act of March 3, 1875, filed in said circuit court a copy of the record in said suit, and duly entered the same at said October term, 1878, of said circuit court, and claim to have removed the said suit to said circuit court.

At the time when said suit was brought the nominal and real plaintiffs were and still are citizens of the State of Massachusetts; said George Baty Blake and Arthur W. Blake, two of said defendants, were

and still are citizens of said Massachusetts, and said Joseph E. Brown, the other of said defendants, was and still is a citizen of the State of New York. The plaintiff on October 17, 1878, filed in said circuit court his said motion to remand said suit to the State court, alleging that the said George Baty Blake and Arthur W. Blake were and are citizens of Massachusetts as aforesaid, and that the said suit does not involve a dispute or controversy properly within the jurisdiction of this court, and that the defendants were not entitled to remove the same to the circuit court.

No objection is made to the form of said petition for removal or of said bond, and it is admitted that the said copy of said record was seasonably filed and entered in said circuit court.

JAMES C. DAVIS,
For the Plaintiff.
BENJ. L. M. TOWER,
For the Defendants.

This cause is thereupon heard by the court, and now, to wit, April 3, 1880, it is ordered that the same be remanded to the said supreme judicial court, to which order the defendants except, and a bill of exceptions being presented to the court, the same is sealed and allowed, which bill of exceptions and allowance thereof are as follows:

Defendants' bill of exceptions.

This was a motion filed by the plaintiffs to remand the above entitled
suit from the circuit court of the United States for the district of
23, 24 Massachusetts to the supreme judicial court for the county of
Suffolk and commonwealth of Massachusetts.

Upon the agreed statement of facts, which is referred to and made part hereof, said circuit court ordered said suit to be remanded from said circuit court of the United States to said supreme judicial court for the county of Suffolk and commonwealth of Massachusetts, to which order the defendants excepted, and the defendants pray that these their exceptions may be allowed.

By their att'ys, BROOKS, BALL & STOREY.

Allowed.
[L. S.]

T. L. NELSON,
U. S. District Judge.

A true record. Attest:

JOHN G. STETSON, *Clerk.*

25, 26 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the district of Massachusetts, within the first judicial circuit, certify that the foregoing is a true copy of the record of said circuit court in the cause of John W. McKim, judge of probate, plaintiff, v. George B. Blake et al., executors, defendants, lately determined in said circuit court, and of all proceedings therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this third day of September, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fifth.

[SEAL.] JOHN G. STETSON, *Clerk.*

27, 28 *Bond on writ of error.*

Know all men by these presents that we, George Baty Blake, of Boston, in the county of Suffolk, in the commonwealth of Massachusetts, Arthur W. Blake, of Brookline, in the county of Norfolk, in said commonwealth, and Joseph E. Brown, of the city, county, and State of New York, executors of the will of George Baty Blake, late of said Brookline, deceased, as principals, and George R. Harris, of Salem, in the county of Essex, and Allen A. Brown, of Boston, in the county of Suffolk, both in the said commonwealth of Massachusetts, as sureties, are held and firmly bound unto John W. McKim, of said Boston, judge of the probate court in and for said county of Suffolk, in the full and just sum of three hundred dollars, to be paid to the said John W. McKim, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators jointly and severally, by these presents, sealed with our seals, and dated the third day of April, in the year of our Lord one thousand eight hundred and eighty.

Whereas lately at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between said John W. McKim, judge of the probate court in and for said county of Suffolk, plaintiff, and the said George Baty Blake, Arthur W. Blake, and Joseph E. Brown, executors as aforesaid, defendants, an order was made remanding said cause from said circuit court to the supreme judicial court for the county of Suffolk and commonwealth of Massachusetts, and the said defendants having procured a writ of error and filed a copy thereof in the clerk's office of the said court to review and reverse the said order in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such, that if the said defendants shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

GEORGE BATY BLAKE. [L. S.]
ARTHUR W. BLAKE. [L. S.]
JOSEPH E. BROWN. [L. S.]
GEO. R. HARRIS, [L. S.]
ALLEN A. BROWN. [L. S.]

Signed, sealed, and delivered in presence of—
ERNEST N. BOYDEN to A. A. B.
HOWARD DAVIS to J. E. B.
ARTHUR BURNHAM witness to G. B. B., A. W. B., & G. R. H.

Approved.

T. L. NELSON,
U. S. Dist. Sudge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest:

JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

29 The United States of America to John W. McKim, of Boston, in the commonwealth of Massachusetts, judge of the probate court in and for the county of Suffolk in said commonwealth, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massachusetts, wherein George Baty Blake, Arthur W. Blake, and Joseph E. Brown, executors of the will of George Baty Blake, late of Brookline, in the commonwealth of Massachusetts, deceased, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why an order remanding said cause from said circuit court to the supreme judicial court for the county of Suffolk, in said commonwealth, rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be reviewed and reversed, and why speedy justice should not be done to the parties in that behalf.

Witness, the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this third day of April, in the year of our Lord one thousand eight hundred and eighty.

T. L. NELSON,
U. S. Dist. Judge.

APRIL 13, 1880.

Due, sufficient, and legal service of the above citation is hereby acknowledged.

JOHN W. McKIM, *Judge, &c.*,
By JAMES C. DAVIS, *Att'y.*

(Indorsement on cover:) No. 860. George Baty Blake, Arthur W. Blake, & Joseph E. Brown, executors of George Baty Blake, deceased, plaintiff in error, vs. John W. McKim, judge of the probate court for the county of Suffolk, Massachusetts. Massachusetts, C. C. U. S. Filed 15th September, 1880.

SUPREME COURT, U.S.
FILED
JAN 10 1951
JAMES H. McKENNEY, CLERK

Supreme Court of the United States,

NO. 860.

GEORGE BATY BLAKE ET ALII, EXECUTORS,

PLAINTIFFS IN ERROR,

v.

JOHN W. McKIM,

JUDGE OF PROBATE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

Supreme Court of the United States,

No. 860.

GEORGE BATY BLAKE ET ALII, *Executors, Plaintiffs in Error,*

v.

JOHN W. MCKIM, *Judge of Probate.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

The sole question raised by the writ of error in this case is whether the original suit brought by the defendants in error against the plaintiffs in error in the Supreme Judicial Court for the county of Suffolk, in the Commonwealth of Massachusetts, was rightfully removed by the original defendants to the Circuit Court of the United States for the District of Massachusetts, the error alleged being the order of said Circuit Court sustaining the motion of the original plaintiffs, and remanding said original suit to said Supreme Judicial Court.

Bill of Exceptions, Transcript of Record, p. 10.

There is no dispute in regard to the facts, which are fully set forth in the agreed statement upon which the motion to remand was heard in the Circuit Court.

Agreed Statement of Facts, Transcript of Record, p. 9.

From said statement it appears that the original plaintiffs, both nominal and real, were when said suit was brought and still are citizens of the State of Massachusetts, and that two of the original defendants were then, and still are, also citizens of said State of Massachusetts, and that the other original defendant then was, and still is, a citizen of the State of New York, and that all of said defendants joined in the petition for removal; and it is admitted that all the requisite forms and proceedings prescribed by the statute (Act of March 3, 1875) for removal were fully and seasonably complied with.

Although the precise point raised here has not as yet received a definite decision from this Court, the construction of the Act of March 3, 1875, has been under discussion so often, and the different views have been so fully and ably presented to the Judges of this Court, both in circuit and in banc, that we can hope to do little else than briefly review positions already taken.

The question of removal is now presented, however, in its baldest form. There is but one controversy here — and that the suit itself — between the plaintiffs on the one hand and the defendants on the other.

Is it a bar to removal that *all* the defendants are not citizens of a State or States, other than that of the plaintiffs?

The original suit, which the plaintiffs in error claim was properly removed to said Circuit Court, is brought to recover a large sum of money, some $50,000, upon a probate bond, on which the testator, of whose estate the plaintiffs in error are executors, was a surety. Upon the merits of the case complicated questions of law and fact will arise, and the result will be of great moment to said estate.

Writ and Declaration, Transcript of Record, pp. 2, 3 and 4.

The issue, then, is most important, not only to these plaintiffs in error, but as involving the construction of a statute of the United States and indirectly of a clause of the Constitution as well.

The fact that the original defendants are executors of a Massachusetts estate does not affect the right of removal.

The *personal* citizenship of the parties determines the jurisdiction of the Circuit Court.

Amory v. *Amory*, 95 U. S. 186.
Coal Co. v. *Blatchford*, 11 Wall. 172.
Childress v. *Emory*, 8 Wheat. 642.
Chappedelaine v. *Dechenaux*, 4 Cranch, 306.
Carter v. *Treadwell*, 3 Story, 25.
Dodge v. *Perkins*, 4 Mason, 435.
Geyer v. *Life Ins. Co.*, 50 N. H. 224.

That the State Court disallowed the petition for removal is wholly immaterial, as it is the duty of the Federal Court to take or refuse jurisdiction without regard to the decision of the State Court.

Taylor v. *Rockafeller*, 6 Reporter 226, Strong, J. (U. S. Cir. Ct., W. D. Penn.).

Mr. Justice Strong says, "The Act declares that after the petition and bond are filed, the State Court shall proceed no farther. . . . No order of the State Court was necessary for the removal. . . . A decision, therefore, of the State Court . . . cannot force jurisdiction upon the Circuit Court, nor can it deny jurisdiction to it."

Also *Cobb* v. *Globe Mut. Life Ins. Co.*, 3 Hughes, 452; Hughes, J. (U. S. Cir. Ct., E. D. Va).
Dunham v. *Baird*, 2 W. N. C. 52 (U. S. Cir. Ct., E. D. Penn.).

The sole objection, then, of any weight raised to the removal of the action to this Court is that *all* the original defendants are not non-residents of Massachusetts.

It is admitted that prior to the statute of March 3, 1875, this action could not have been removed from the State Court.

But we contend that the statute of 1875 authorizes such removal.

By Sect. 1 of this Act a broader jurisdiction is conferred upon the Circuit Courts than ever before. The language, so far as it affects the question at issue, is as broad as that of the Constitution; *indeed the precise words are used.*

Jurisdiction is conferred of all suits at law or in equity, involving more than $500, "*in which there shall be a controversy between citizens of different States.*"

Sect. 2 provides for the removal of any such suit (using the same language) from any State Court to the Circuit Court of the United States for the proper district.

The single question, then, is whether this Court has *jurisdiction* of such an action, the language of Sect. 2 authorizing the removal being identical with that of Sect. 1 conferring jurisdiction.

The Judiciary Act of 1789 (c. 20, §§ 11 and 12) conferred jurisdiction upon, and authorized removal to the Circuit Court, where the "suit is between a citizen of the State where the suit is brought, and a citizen of another State," and the Supreme Court held that this language required that each of the plaintiffs and defendants must be competent to sue and be sued in the Circuit Court; in other words, that each side must be a unit.

Strawbridge v. *Curtis*, 3 Cranch, 267.

This decision held good under all the later statutes prior to 1875, and was followed in the Sewing Machine cases under the Act of 1867.

But the Act of 1875 has removed the limitation imposed by the prior statutes.

Under the Constitution, then, is it necessary that each plaintiff shall be capable of suing each defendant in the Circuit Court, in order that jurisdiction be conferred?

Does the fact that a single one of several parties on one side is a resident of the same State with the opposite party, prevent the jurisdiction from attaching under the Constitution?

We submit that such could not have been the intent of its framers.

The purpose of this clause of the Constitution was to extend the jurisdiction of the Federal Courts to cases in which the State tribunals could not be supposed to be impartial or unbiassed.

Hamilton, in *The Federalist*, No. 80.

The intent clearly was, that no person should be compellable to submit to the decision of the tribunals of a State

other than that in which he had voluntarily chosen to reside; his interests might be affected by local prejudice; and as the Federal tribunals are presumed to stand wholly impartial, it is no sufficient reason for taking away their jurisdiction, that it is not required by some of the parties on the one side or the other. With the framers of the Constitution the States were foreign to each other, and the source of all power; such powers were ceded, however, to the general government; in other words, there was such a degree of centralization as seemed necessary for affording ample protection in all his rights to every citizen of the United States.

The object of the provision under discussion was clearly to secure to non-residents of the State where the suit is brought, the right under the Constitution to an impartial trial; and ought they to be debarred of this right by the fact that some one is joined with them in interest who does not need the aid of the Federal Courts?

In *Tennessee* v. *Davis*, 100 U. S., 263, this Court has said: "The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme."

The intent to grant the jurisdictional power is clear, — why seek to limit the scope of that power?

It matters not that in the case at bar only one original defendant is a non-resident of Massachusetts, or that the Court may be of opinion that the State Court can here administer impartial justice; of this the party concerned and not the Court must be the sole judge.

The case is of great importance to these plaintiffs in error, and if in their desire that the highest court of this country should pass upon questions of law involved, they urge here their constitutional right to a trial in the Federal Courts, we

submit that the Court will construe the language of the Constitution liberally in favor of this right, and not debar them by subtle reasoning and strict construction.

Judge Dillon, in his pamphlet on the Removal of Causes, p. 22, says: "The experience of the past should induce great caution in the courts in applying to that Act (1875) the rigid principles of the early adjudications on the subject of Federal jurisdiction"; and on p. 30, "Looking at the purpose in the grant of the Federal judicial power in the Constitution, and the benefits which are felt to flow from the exercise of this jurisdiction, and the embarrassments which would result from a close and rigid construction of the Constitution in this regard, we think the Supreme Court would be justified in holding that a case does not cease to be one between citizens of different States, because one or some of the defendants are citizens of the same State with the plaintiffs, or some of the plaintiffs, provided the other defendants are citizens of another or other States."

The inference from the statute itself is strongly in favor of the jurisdiction.

The last clause of Sect. 2 is as follows: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district"; and Sect. 3 provides: —

"That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a State Court to the Circuit Court of the United

States, he or they may make and file a petition in such suit in such State Court," etc.

It is clear that in a case like the one at bar, *all* the parties on one side must concur in the petition for removal.

There might be a hardship, as the framers of this statute perceived, in allowing one or more of several plaintiffs or defendants, being non-residents, against the will of their co-plaintiffs or co-defendants, to remove a suit, in which all are equally interested, to another court; it was therefore provided by the last clause of Sect. 2, that such non-resident or non-residents, being a portion of one side, could do this only where there was a separate controversy which concerned themselves alone, and in which their co-plaintiffs or co-defendants, who were not non-residents, had no interest.

Hence the provision of Sect. 3, that one or more of several plaintiffs or defendants having a separate controversy may petition *separately* for removal.

From this follows the clear inference, which it was unnecessary to state in more express terms, that where, as in the case at bar, there is no such separate controversy, that is, no controversy which, in the language of the statute, is "wholly between citizens of different States," the joinder of *all* the plaintiffs or defendants in the petition for removal is necessary, and upon such petition and proceeding by *all* of one side, *all* or *some of whom* are citizens of different States from the opposite party, the case is removable.

In the case at bar, *all the defendants* have so petitioned.

The statute itself thus recognizes the right of such removal.

We have said that this question has already been before this Court sitting *in banc*; we need only allude to the

Removal Cases (*so called*), 100 U. S. 457;

and to the opinion there rendered (page 479) by Mr. Justice Bradley, dissenting (as did also Mr. Justices Strong and Swayne) from so much of the opinion of the majority of the Court as seemed adverse to the view we now urge.

The question has arisen frequently, and been the subject of numerous conflicting decisions in the Circuit Courts.

In the case of *Taylor* v. *Rockafeller*, 6 Reporter, 226 (U. S. Cir. Ct., W. D. Penn.), cited above, decided by Mr. Justice Strong, the petitioners, being a portion of the defendants, were non-residents, and the other defendants and the plaintiffs were residents of the State where the action was brought. The petition was based on the ground of a controversy wholly between the plaintiffs and the petitioners, and although not the sole controversy in the case, the Circuit Court refused to remand, and entertained jurisdiction.

The Court says: "The petitioners are, therefore, citizens of a different State from the plaintiffs, though some of the plaintiffs and some of the defendants are citizens of the same State. Before the Act of 1875 the Circuit Court would have had no jurisdiction, because each of the plaintiffs was not capable of suing each of the defendants in a Federal Court.

"But the Act of 1875 introduced great changes. *Under it any cause which might have been commenced in the Circuit Court may be removed to it.* Whether since the Act of 1875 the right of removal extends to all cases in which some of the necessary or indispensable defendants are citizens of the same State with the plaintiffs, or some of them, is undoubtedly a very important question not yet decided. It does not, if the rule applied to the Acts of 1789, 1866, and 1867 is applicable. But the later Act (of 1875) for the first time adopts the language of the Constitution, and

seems to have intended to confer all the jurisdiction it was in the power of Congress to bestow.

"*Certainly the case mentioned would be a controversy between citizens of different States;* and the reasons which induced the framers of the Constitution to give jurisdiction to the Federal Courts apply as strongly as where all the defendants are citizens of a State other than that of which the plaintiffs are citizens; and if the instrument is to be construed to carry out its intent, the question should be answered in the affirmative."

In *Lockhart* v. *Horn*, 1 Woods C. C. R. 628, 634, decided under the Act of 1867, Mr. Justice Bradley said: "Were this an original question, I should say that the fact of a common State citizenship existing between the complainants and a part only of the defendants, provided the other defendants were citizens of the proper State, would *not* oust the court of jurisdiction.

"*It certainly would not under the Constitution. The case would still be a controversy between citizens of different States.* But the strict construction put by the courts upon the Judiciary Act is decisive against the jurisdiction, and I am bound by it."

In the later case of *Girardey* v. *Moore* (U. S. Cir. Ct., S. D. Georgia), 5 Central L. J. 78, decided under the Act of 1875, Judge Bradley stated his view of the true construction of that Act with great fulness, saying: "The true interpretation of this statute involves the true interpretation of the constitutional power. The jurisdiction given to the Circuit Court is as broad as the judicial power. Now, as to the extent of the judicial power, I never had a doubt; . . . it is this: that whenever the controversy in a suit is between citizens of different States, it is within the judicial power of the United States, though there are other persons in the case, citizens of the same State with a person or persons on the

opposite side to them. But to whom is the right of removal given? The answer, as derived from the second section, is that it is given to either party, — that is, to the plaintiffs or the defendants in either case acting collectively; and where the controversy is wholly between citizens of different States, and can be determined as between them, the right is given to any one or more of the plaintiffs or defendants actually interested in the controversy. In other words, if some of the plaintiffs or defendants are citizens of the same State, the removal must be sought by all the defendants."

In *Osgood* v. *Chicago, D. and V. R. R. Co.*, 6 Bissell, 330, 337 (U. S. Cir. Ct., N. D. Ill.), Judge Drummond says that the first clause of Sect. 2 refers to a removal "by the whole of what constitutes the one side or the other. The second clause states when a case can be removed by either parties less than the whole."

He also says, "As this is a case where there are several defendants, *some of whom have not joined in the petition for removal*, the question is whether there is a controversy wholly between the plaintiff and those who have petitioned for a removal."

In *Re Fraser's Estate*, 6 Reporter, 357 (U. S. Cir. Ct., E. D. Mich., Swayne J.), only the non-residents joined in the petition for removal, and although Judge Swayne held that the word "party," in the Act of 1875, is collective, he expressly says, "I feel constrained" so to hold, "in the light of the past adjudications, and in the absence of any expression from the Supreme Court (whatever might be my judgment under the circumstances.)"

The precise view we are urging was taken in

Sheldon v. *Keokuk N. L. Packet Co.*, 1 Fed. Rep., 789, 794 *et seq.* (U. S. Cir. Ct. Wis., 1880.)

Judge Bunn says: "The language of the Constitution is not at all ambiguous, and seems fairly to include all controversies between citizens of different States, not excepting those where some of the parties to the controversy, plaintiff or defendant, have a common State citizenship with some or all of the opposite party."

In *National Union Bank* v. *Dodge* (U. S. Cir. Ct., N. J.), 25 Int. Rev. Rec. 304, Nixon, J., says: "I am of the opinion that the federal jurisdiction is not lost in a suit between citizens of different States, because there may be found in it, as necessary parties, one or more defendants of the same State with the plaintiff, or some of the plaintiffs. Their presence makes it none the less a controversy between citizens of different States." And he sustained the motion to remand solely and expressly on the ground that all the defendants had not joined in the petition for removal.

So in *Ruckman* v. *Palisade Land Co.*, 1 Fed. Rep. 367 (U. S. Cir. Ct., N. J., March, 1880), where Judge Nixon says that a suit under the first clause of Sect. 2 "is only removable when either party, that is *all* of the plaintiffs or *all* of the defendants, join in the petition for removal"; but that a suit under the second clause of that section may be removed by one or more of the plaintiffs or defendants actually interested in a controversy.

In *Smith* v. *McKay*, 4 Fed. Rep. 353 (U. S. Cir. Ct., E. D. Mich., Nov. 1880), Judge Brown says, "Upon a careful reading of this section (2), I have concluded that the first clause relates only to cases in which there is a single indivisible controversy, and in which all the individuals upon the moving side are necessary parties to such controversy. In such case *all* of the individuals upon such side of the con-

troversy must unite in the petition. The second clause contemplates cases in which there shall be parties whose presence is not necessary to the determination of the main controversy, in which case either one or more of their co-parties may petition for removal."

In *Tyler* v. *Hagerty*, 5 Reporter, 300 (U. S. Cir. Ct., N. D. Ohio, Welker, J.), the Court merely held that under the last clause of Sect. 2 of the Act of 1875, one of the defendants could not petition to remove the suit unless the controversy were wholly between him and the plaintiffs; which precisely accords with our argument.

So *Carraher* v. *Brennan*, 7 Biss. 497 (U. S. Cir. Ct., N. D. Ill., Blodgett, J.)

In *Exp. Grimball*, 7 Rep. 362 (Sup. Ct., Ala.), one of several defendants petitioned for the removal of the case to the United States Court; all the parties, except the petitioner (who was a resident of New York), were residents of Alabama.

The suit was held not removable, on the ground that Grimball was not a necessary party, and that *none of the other parties* joined Grimball in his petition.

The Court said, "There is not in it a controversy which is wholly between citizens of different States and which can be fully determined between them, and it is not therefore such a suit as under the Act of 1875 can be removed *upon the petition of one of the several defendants.*"

So in *Bailey* v. *N. Y. Savings Bank*, 2 Fed. Rep. 14 (U. S. Cir. Ct., S. D. N. Y., Blatchford, J.), only one of the defendants petitioned for removal.

The decisions and dicta opposed to the view we have taken are in general based upon the decisions under the Judiciary Act, and simply evidence a reluctance to take a new departure until light shall have been shed upon the subject by the Supreme Court sitting *in banc.*

There is a remark of Waite, C. J., in *Ober* v. *Gallagher*, 93 U. S. 199, which does not accord with our position.

But in the later case of *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 204, he says, "The Act of 1875 has made some radical changes in the law regulating removals. Important questions of practice are likely to arise under it"; and he is careful to decide only the precise question involved.

In *Board of Commissioners of Arapahoe County* v. *Kansas Pacific Railway Co.*, 4 Dillon, 277 (U. S. Cir. Ct., Dist. Col.), Mr. Justice Miller relies wholly on the interpretation of the Judiciary Act in *Cohens* v. *Virginia*, 6 Wheat. 264, and does not discuss the question from the standpoint of the Constitution; moreover, a part only of the defendants petitioned, and the cause was held removable under the last clause of Sect. 2.

In *Burke* v. *Flood*, 1 Fed. Rep. 541 (U. S. Cir. Ct., Cal., Jan., 1880), Judge Sawyer followed the Sewing Machine cases and his understanding of the Removal Cases.

Petterson v. *Chapman*, 13 Blatchford, 395 (U. S. Cir. Ct., N. D. N. Y., Johnson, J.) and

Ruble v. *Hyde*, 3 Fed. Rep. 330 (U. S. Cir. Ct., Minn., Nelson, D. J.), are opposed to our view.

In *Tremain* v. *Amory* (U. S. Circuit Ct., Mass. Dist.),

Judge Lowell discusses the meaning of the word "controversy" in the Constitution, and holding it synonymous with "suit" in the Judiciary Act, considers himself on that ground alone bound by the prior decisions, while regretting, apparently, the narrow construction which had been given to that Act.

It is needless to say that this technical reasoning avoids the broad question at issue. We have not based our argument upon any particular meaning of the word "controversy." Placing the broad language of the Constitution, "controversies between citizens of different States," in contrast with the language of the Judiciary Act, "suits" (or controversies if you please) "between a citizen of the State where the suit is brought, and a citizen of another State," the question is whether the former is susceptible of the narrow construction given to the latter.

Under the Act of 1875, it is clear that neither party need be a citizen of the State where the suit is brought. But if this were the sole distinction, why should not the statute of 1875 have read "suits" (or controversies, perhaps) "between a citizen of one State and a citizen of another State"?

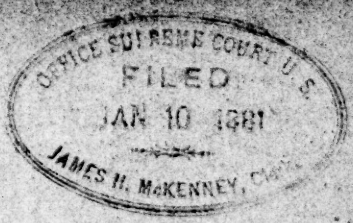
Each side should then clearly have been a unit under the interpretation applied to the Judiciary Act.

Is there no difference, then, between this language and the expression "controversies between citizens of different States," as used in the Constitution?

We respectfully submit that this Court, no longer trammelled by the narrow interpretation of the Judiciary Act, and free to construe the language of the Constitution in accordance with the broad intent of its framers, will hold in favor of the right of removal.

We have cited substantially all the cases bearing upon the point that have come to our notice, and we submit that in

the absence of any binding decision, the weight of reason, which we confidently believe to be strongly in favor of the plaintiff in error, should govern the decision of this Court.



Supreme Court of the United States.

October Term, 1880. No. 860.

GEORGE BATY BLAKE ET ALS., EXECUTORS,

PLAINTIFFS IN ERROR,

v.

JOHN W. McKIM,

JUDGE OF PROBATE.

ARGUMENT FOR THE DEFENDANT IN ERROR.

Supreme Court of the United States.

OCTOBER TERM, 1880. No. 860.

GEORGE BATY BLAKE ET AL., *Executors of* GEORGE BATY BLAKE, *deceased, Plaintiffs in Error,*

v.

JOHN W. MCKIM, *Judge of the Probate Court for the County of Suffolk, Massachusetts.*

ARGUMENT FOR THE DEFENDANT IN ERROR.

This is a suit upon a probate bond given by a trustee under the will of a citizen of Massachusetts against the executors of the will of one of the sureties, who was also a citizen of Massachusetts. Two of the executors are citizens of Massachusetts, and the third is a citizen of New York. The defendant in error is the judge of the Probate Court, a citizen of Massachusetts, in whose name this action is brought for the benefit of the *cestuis que trust*, who are all of Massachusetts.

No question arises under the Constitution, laws, or treaties of the United States, and the case is one which is especially suitable to be tried in the courts of the State of Massachusetts. The bond in suit was given, the trustee was appointed, and the trust was administered under the probate laws of this State; and the controversy must be determined in accordance with these laws, which can best be interpreted by the tribunals of the State.

The executors' testator was of the State of Massachusetts, and they are acting as executors within its jurisdiction and under appointment of one of its probate courts. Their accounts are rendered and settled here, and all their doings are under the authority and subject to the control of this probate court.

It has been held by the courts of the United States that no action can be maintained against an executor or administrator unless he has been appointed to that office by the proper tribunals having jurisdiction in probate matters in the State or county where the suit is instituted.

3 Redfield on Wills, 272.
Vaughan v. *Northrup*, 15 Pet. 1.

The majority of the executors have the same citizenship as the defendant in error, and reside in the jurisdiction under which they derive their official authority, and the citizenship of the plaintiffs in error, as executors, should be deemed to be that of the majority of the board. The third executor has no interest in the controversy which can be separated from that of the others, and his non-residence does not in any sense make the action a controversy between citizens of different States.

Several executors of one testator "are all considered in law in the light of an individual person."

Williams on Exeectors (7th ed.), 245, 946.

Can the citizenship of the board be held to be in New York, where only one of the three executors resides, in a jurisdiction in which the executors have no official existence or authority?

The executor who resides in New York is not a necessary party to the suit. In an action in a Massachusetts court

against executors or administrators, if one lives in another State, and has not been served with process, the action may be prosecuted to judgment against those who have been served with process, as the judgment is against the estate of the deceased person whom they represent, and not against themselves personally.

Tappan v. *Bruen*, 5 Mass. 196.

The interest of the plaintiffs in error being joint and inseparable, and the major part of them being citizens of the same State with the defendant in error, the judicial power of the United States, under the Constitution, does not authorize its courts to take jurisdiction of the case. The substantial controversy is between citizens of the same State, and it is not and cannot become one of Federal cognizance.

Oler v. *Gallagher*, 93 U. S. 199, 204.

Dillon on Removal of Causes (2d ed.), 29-31, and cases cited.

Bryant v. *Rich*, 106 Mass. 192.

Florence Sewing Machine Co. v. *Grover & Baker Sewing Machine Co.*, 110 Mass. 80.

In the removal cases decided at the last term of this Court, upon mature consideration, after a reargument, in which all attorneys having similar cases in any of the circuits were invited to participate, the opinion of the majority of the Court intimates that for the purpose of a removal under the 2d Section of the Act of March 3, 1875, the matter in dispute may be ascertained, and the parties to the suit arranged on opposite sides of that dispute, and that it is requisite for the removal of the suit that on such arrangement it should appear that those on one side are all citizens of different States from those on the other.

Removal Cases, 100 U. S. 457, 468.

Numerous cases in the different circuits have been decided in accordance with this ruling, it being held that for the purpose of removal the requisite jurisdictional citizenship must exist as to each individual of the respective parties to the controversy ascertained to exist in the suit.

Burke v. *Flood*, Sawyer, J., California, Jan., 1880, 1 Fed. Rep. 541; S. C., 9 Reporter, 501.

Bailey v. *N. Y. Savings Bank*, Blatchford, J., New York, April, 1880, 2 Fed. Rep. 14; S. C., 9 Rep. 659.

Chicago, etc. R. R. v. *McComb*, Blatchford, J., New York, December, 1879, 9 Reporter, 569.

Ruble v. *Hyde*, Nelson, J., Minnesota, 1880, 3 Fed. Rep. 330.

Ruckman v. *Palisade Land Co.*, Nixon, J.; New Jersey, March, 1880, 1 Fed. Rep. 367.

Temple v. *Smith*, McCrary, J., Nebraska, November, 1880, 4 Fed. Rep. 392.

Fraser's Estate, Swayne, J., Michigan, Aug., 1878, 6 Reporter, 557.

Patterson v. *Chapman*, Johnson, J., New York, June, 1876, 13 Blatchf. 396.

Sawyer v. *Switzerland Ins. Co.*, Blatchford, J., New York, May, 1878, 14 Blatchf. 451.

Van Brunt v. *Corbin*, Benedict, J., New York, June, 1878, 14 Blatchf. 496.

JAMES C. DAVIS,

For the Defendant in Error.

340
344
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July.
Dec. 13. 1880
Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~401.~~ 1324

LEWIS WEITZEL, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

GERHARD H. RABE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED APRIL 12, 1878.

69

SUPREME COURT OF THE UNITED STATES.

No. 401.

LEWIS WEITZEL, COLLECTOR OF INTERNAL REVENUE, PLAINTIFF IN ERROR,

vs.

GERHARD H. RABE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

INDEX.

	Original.	Print.
Petition	2	1
Præcipe	4	2
Summons	5	2
Marshal's return	6	3
Answer	7	3
Journal entry: Verdict and judgment	9	3
Journal entry: Motion for a new trial overruled and stay of execution	10	4
Journal entry: Stay of execution	11	4
Journal entry: Bill of exceptions signed, sealed, and allowed	12	4
Bill of exceptions	12	5
Clerk's certificate	20	10
Writ of error	21	10
Citation	23	11

1 At a stated term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court rooms in the city of Cincinnati, on the first Tuesday of October, being the second day of that month, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and second. Present, the honorable Philip B. Swing, district judge. Among the proceedings had, were the following, to wit:

GERHARD H. RABE, PLAINTIFF,
vs.
LEWIS WEITZEL, DEFENDANT. } No. 2508. Money.

Be it remembered that heretofore, to wit, on the sixth day of June, in the year of our Lord one thousand eight hundred and seventy-seven, came the said plaintiff by his said attorney, and filed in the clerk's office of said court his certain petition in said cause, clothed in the words and figures following, to wit:

2 *Petition.*

Circuit court of the United States, southern district of Ohio.

GERHARD H. RABE, PLAINTIFF,
vs.
LEWIS WEITZEL, DEFENDANT.

And now comes Gerhard H. Rabe, plaintiff, and file this his petition against the said Lewis Weitzel, defendant, and says that on the sixteenth day of August, 1876, the Commissioner of Internal Revenue illegally and wrongfully assessed against plaintiff as distiller engaged in the business of distilling in the first collection district of the State of Ohio an internal revenue tax of seven hundred and fifty-four $\frac{63}{100}$ ($754.63) dollars, as upon the product in spirits of an alleged excess of material used for the production of spirits over and above the producing capacity of the distillery of plaintiff, in the month of May, 1876, and caused the same to be forwarded and delivered to the said Lewis Weitzel, as collector of the said collection district, for collection.

3 Plaintiff says that it is not true that there existed any such excess of material used over the actual and lawful producing capacity of plaintiff distillery, but he says that said assessment was illegal and oppressive, and plaintiff protested against the same.

Plaintiff further says that the said Lewis Weitzel, under authority of his said office, made demand upon plaintiff for said pretended taxes, and under compulsion of his said authority, and to avoid distraint and seizure of his property and protesting against the payment thereof, plaintiff did on the 25th day of April, 1877, pay to the said Weitzel the said pretended taxes, to wit, the sum of seven hundred and fifty-four $\frac{63}{100}$ ($754.63) dollars.

Plaintiff further says that, on the 23rd day of May, 1877, he made and filed in due form of law, application to the said Commissioner of Internal Revenue to refund and repay to him said sum so paid as aforesaid, which claim was, on the 29th day of May, 1877, rejected by said Commissioner and plaintiff notified thereof by mail.

By reason of said premises plaintiff has become entitled to claim and

recover of the said defendant the said sum of seven hundred and fifty-four $\frac{63}{100}$ ($754.63) dollars, with interest from the said 25th day of April, 1877.

Wherefore plaintiff prays judgment against the said Lewis Weitzel in the said sum of seven hundred and fifty-four $\frac{63}{100}$ ($754.63) dollars with interest from the 25th day of April, 1877, and for their costs herein expended.

4 WARNER M. BATEMAN,
Attorney for Plaintiff.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Gerhard H. Rabe, being first duly sworn, says that he is the plaintiff in the within-named cause, and that he believes the statements of the foregoing petition to be true.

Sworn to before me this 6th day of June, 1877.

CHAS. F. SEYBOLD,
Notary Public, Hamilton County, Ohio.

Præcipe.

GERHARD H. RABE
vs.
LEWIS WEITZEL.

The clerk will issue summons for the above-named defendant, Lewis Weitzel, at Cincinnati, returnable according to law.

Indorse: Action for money only. Amount claimed, $754.63.

WARNER M. BATEMAN,
Attorney for Plaintiff.

5 And thereupon, afterwards, to wit, but on the same day and year aforesaid, there was issued out of the clerk's office of said court, our certain writ of summons against the said defendant, clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are commanded to summon Lewis Weitzel, citizen of and resident in the State of Ohio, if he be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio, aforesaid, at Cincinnati, on the third Tuesday in the month of June, 1877, to answer unto Gerhard H. Rabe, citizen of and resident in the State of Ohio, in an action for money.

And have you then and there this writ.

Witness the honorable M. R. Waite, Chief Justice of the United States, this 15th day of June, A. D. 1877, and in the 101st year
6 of the Independence of the United States of America.

Attest:
[SEAL.] THOS. AMBROSE,
Clerk.

And afterwards, to wit, on the 19th day of June, in the year aforesaid, came the said marshal to whom the said writ was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon in the words and figures following, to wit:

Received this writ at Cincinnati, O., June 6th, A. D. 1877, and served the within named in Hamilton County, as follows: Lewis Weitzel per. at 5.30 p. m., June 6th, 1877.

W. R. THRALL,
U. S. M.,
By JNO. L. JEFFRIES,
Dep't.

7 And afterwards, to wit, on the thirty-first day of July, in the year aforesaid, came the defendant by Channing Richards, his attorney, and by leave of court first had and obtained filed in the clerk's office of the court aforesaid his certain answer in said cause, clothed in the words and figures following, to wit:

Answer.

Circuit court of the United States, southern district of Ohio.

GERHARD H. RABE, PLAINTIFF,
vs.
LEWIS WEITZEL, DEFENDANT. } No. 2508.

The defendant, Lewis Weitzel, denies that the assessment made against plaintiff by the Commissioner of Internal Revenue on the 16th day of August was illegal and wrongful, and says that an excess of material used over the actual and lawful producing capacity of plaintiff's distillery did exist as determined by said Commissioner.

CHANNING RICHARDS,
Att'y for Def't, Lewis Weitzel.

8 UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Lewis Weitzel, the defendant, being duly sworn, says that the foregoing answer is true according to the best of his knowledge, information, and belief.

LEWIS WEITZEL.

Subscribed and sworn to before me this 31st day of July, 1877.
THOMAS AMBROSE, *Cl'k.*

And afterwards, to wit, on the 30th day of November, in the year aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

9 *Verdict and judgment.*

GERHARD H. RABE
vs.
LEWIS WEITZEL. } No. 2508. Money.

This day came the parties by their attorneys, and thereupon a jury

being called, came, to wit: W. H. Boake, William T. Evans, Lafayette Eggleston, Hugh Gibson, S. R. Hosmer, William Hamilton, George W. Jones, Charles L. Madison, James C. King, John Steel, W. E. Kuhn, and W. H. Pickleheimer, who, being duly empaneled and sworn well and truly to try the issue joined between the parties, upon their oaths do find the issue to be in favor of the plaintiff, and do asses' his damages by reason of the premises at seven hundred and fifty-four dollars and sixty-three cents.

It is therefore considered that the plaintiff recover of the said defendant the sum of $754.63 and his costs herein expended, taxed at $.

10 And afterwards, to wit, on the eighth day of December, in the year aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

GERHARD H. RABE
vs.
LEWIS WEITZEL. } 2508. Money.

This day came the attorney for the defendant, Channing Richards, esq., as also the plaintiff by his attorney, W. M. Bateman, esq., and this case coming on to be heard upon the motion for a new trial, and the court after the argument of counsel, and being fully advised in the premises, overrules said motion, to which order overruling said motion the defendant by his attorney excepts.

And it appearing that the defendant desires to carry the questions herein involved to the Supreme Court, it is ordered that execution in this case be stayed until the further order of the court.

11 And afterwards, to wit, on the thirteenth day of December, in the year aforesaid, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

Stay of execution.

GERHARD H. RABE
vs.
LEWIS WEITZEL. } No. 2508. Money.

It appearing to the court that the defendant was an officer of the revenue and that he acted in the performance of his official duty under the directions of the proper officer of the government in the acts complained of herein, it is therefore ordered by the court that no execution issue against the defendant on the judgment recovered against him herein, so that the same may be provided for and paid out of the proper appropriation by the Treasury.

And afterwards, to wit, on the eleventh day of January, in the year of our Lord one thousand eight hundred and seventy-eight, an entry was made upon the journal of said court in said cause, clothed in the words and figures following, to wit:

12 GERHARD H. RABE
vs.
LEWIS WEITZEL. } No. 2508. Money.

And now comes Channing Richards, attorney for the defendant,

Lewis Weitzel, and presents to the court his bill of exceptions in said case, which is allowed by the court, signed, sealed, and ordered to be made a part of the record.

Which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions.

Circuit court of the United States, southern district of Ohio.

GERHARD H. RABE, PLAINTIFF, *vs.* LEWIS WEITZEL, DEFENDANT. } No. 25 .

Be it remembered that this cause coming on to be heard at the October term, A. D. 1877, of said court before a jury, evidence was introduced by plaintiffs tending to prove:

1. That previous to May 2d, 1876, the capacity of plaintiff's distillery was fixed by the survey at 415.96 bushels of grain each
13 twenty-four hours, the fermenting period being forty-eight hours.

2. That on said 2nd day of May plaintiff went to the collector's office and notified the deputy in charge of distilleries that he desired to reduce his capacity to 207.45 bushels by closing six fermenting tubs then in use; said agent then signed three blank notices given him by said deputy, leaving them with said deputy, who filled up and filed the same, true copies of which said notices as filed are hereto attached as Exhibit A, B, & C. Said deputy thereupon closed and sealed the six tubs successively on the 2d, 3d, and 4th, in accordance with said notices.

3. That on the 2nd and 3rd days of May, plaintiff mashed but 207.45 bushels of grain, but distilled the beer from 415.96 bushels of grain mashed upon the 30th of April and 1st May; on each remaining day of the month they used the exact amount of grain fixed by the capacity. On the receipt of the distiller's return for said month, the Commissioner of Internal Revenue made an assessment against him for an excess of grain used during said month, being the excess of grain used on said 2d and 3d days of the month over and above the reduced capacity specified in the notices above set forth, to wit, in excess of 346.29 bushels on the 2d, and 276.03 bushels on the 3rd, and said assessment having been paid to defendant as collector of internal revenue, this suit has been brought to recover the same.

14 4. That the mode of reducing capacity by giving three notices and closing tubs on successive days after they had remained empty twenty-four hours, was the uniform practice in the first collection district of Ohio until changed in accordance with circular No. 38, from the Commissioner of Internal Revenue, dated Feb'y 20th, 1877, and the distiller desiring to reduce capacity was required by the collector to give the three notices.

5. That plaintiff reported all spirits produced by them during said month, and paid tax thereon according to law.

The court thereupon charged the jury as follows:

"The conclusion to which I have arrived is that the producing capacity of this distillery was not in law reduced until the 4th day of May; that it continued for the 2nd and 3rd days of May to be 415.96 bushels, and this being the amount of grain in fact used, there was no use of

grain by the distiller in excess of the capacity of his distillery; the assessment was therefore illegal."

To which said charge the defendant, by his attorney, then and there excepted.

And thereupon the defendant, by his attorney, asked the court to instruct the jury as follows:

"When the distiller gave notice in the form prescribed that he desired to reduce capacity on and after a day specified in the notice by closing a designated fermenting tub, and such tub was thereupon closed by the deputy collector in accordance with the notice, the legal
15 effect was to reduce the capacity of the distillery on after that day, and if the distiller on or after that day used grain in excess of the reduced capacity, although mashed before the reduction, the Commissioner was authorized by law to make an assessment for the excess, and the distiller cannot recover the same from the collector."

Which said charge was refused by the court, and defendant then and there excepted.

16 EXHIBIT A.

Notice of change in capacity.

126.—Revised April 13, 1876.

(In duplicate.)

(One copy to be forwarded to the Commissioner of Internal Revenue.)

MAY 2, 1876.

L. WEITZEL,

Collector 1 District of Ohio:

SIR: Application is hereby made for change of capacity of my distillery No. 2, from 415.96 bushels of grain, producing 1,663.84 gallons proof spirits, to 346.29 bushels of grain, producing 1,385.16 gallons proof spirits, each twenty-four hours, from corn; bushels of grain, producing gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, by closing the following numbered fermenting tubs, changing the fermenting period from 48 hours to 48 hours, by varying the strength of the beer from 45 gallons per bushel to 45 gallons per bushel.*

Working capacity, in gallons.				Working capacity, in gallons.				Working capacity, in gallons.			
No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.
3	4,703										
8	4,703										
	9,406										

Total working capacity of tubs in use after the change, in gallons, from corn, 46,749.

*NOTE.—Forty-five gallons of beer is the maximum number representing a bushel in the fermenting tubs, except in sour-mash distilleries, where sixty gallons is allowed. Changes in capacity by changing the fermenting period or varying the strength of beer will be allowed only when the notice is accompanied by a new survey.

Total working capacity of tubs in use after the change, in gallons from rye, .

To take effect on and after May 2nd, 1876.

I will thank you to send the proper officer to close the tubs specified.

(Signed) G. H. RABE,
Distiller.

I certify that on this the 2nd day of May, 1876, I visited the distillery of G. H. Rabe, No. 2, and caused fermenting tubs Nos. 3 & 8 to be closed by closing beer-trough of same in accordance with the above notice.

(Signed) E. C. URNER,
Deputy Collector.

COLLECTOR'S OFFICE, 1 DISTRICT OHIO,
May 2, 1876.

I certify that the above application was complied with on May 2, 1876, by closing the fermenting tubs specified, changing the fermenting period, or authorizing the setting of beer at the strength specified, and that the capacity of said G. H. Rabe's distillery No. 2 is, from that date, fixed at 346.29 bushels of grain and 1,385.16 gallons of proof spirits, each twenty-four hours, from corn ; bushels of grain and gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, in accordance with survey of said distillery, made by E. C. Urner Jan'y 12, 1876.

(Signed) LEWIS WEITZEL,
Collector.

17 EXHIBIT B.

Notice of change in capacity.

126.—Revised April 13, 1876.

(In duplicate.)

(One copy to be forwarded to the Commissioner of Internal Revenue.)

MAY 2, 1876.

L. WEITZEL,
Collector 1 *District of Ohio:*

SIR: Application is hereby made for change of capacity of my distillery No. 2 from 346.29 bushels of grain, producing 1,385.16 gallons proof spirits, to 276.03 bushels of grain, producing 1,104.12 gallons proof spirits, each twenty-four hours, from corn ; bushels of grain producing gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, by closing the following numbered fermenting tubs, changing the fermenting period from 48 hours to 48 hours, by varying the strength of the beer from 45 gallons per bushel to 45 gallons per bushel.*

*NOTE.—Forty-five gallons of beer is the maximum number representing a bushel in the fermenting tubs, except in sour-mash distilleries, where sixty gallons is allowed. Changes in capacity by changing the fermenting period or varying the strength of beer will be allowed only when the notice is accompanied by a new survey.

Working capacity, in gallons.				Working capacity, in gallons.				Working capacity, in gallons.			
No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.
12	4,746										
15	4,739										
	9,485										

Total working capacity of tubs in use after the change, in gallons, from corn, 372.64.

Total working capacity of tubs in use after the change, in gallons, from rye,

To take effect on and after May 3rd, 1876.

I will thank you to send the proper officer to close the tubs specified.

(Signed) G. H. RABE,
Distiller.

I certify that on this the 3rd day of May, 1876, I visited the distillery of G. H. Rabe, No. 2, and caused fermenting tubs Nos. 12 & 15 to be closed by closing beer-troughs of same, in accordance with the above notice.

(Signed) E. C. URNER,
Deputy Collector.

COLLECTOR'S OFFICE, 1 DISTRICT OHIO,
May 3rd, 1876.

I certify that the above application was complied with on May 3rd, 1876, by closing the fermenting tubs specified, changing the fermenting period, or authorizing the setting of beer at the strength specified, and that the capacity of said G. H. Rabe distillery No. 2 is, from that date, fixed at 276.03 bushels of grain and 1,104.12 gallons of proof spirits, each twenty-four hours, from corn; bushels of grain and gallons of proof spirits, each twenty-four hours, from rye; and gallons from molasses, in accordance with survey of said distillery, made by E. C. Urner Jan'y 12, 1876.

(Signed) LEWIS WEITZEL,
Collector.

18 EXHIBIT C.

Notice of change in capacity.

126.—Revised April 13, 1876.

(In duplicate.)

(One copy to be forwarded to the Commissioner of Internal Revenue.)

MAY 2, 1876.

L. WEITZEL,
Collector 1 District of Ohio:

SIR: Application is hereby made for change of capacity of my distillery No. 2 from 276.03 bushels of grain, producing 1,104.12 gallons proof spirits, to 207.45 bushels of grain, producing 829.80 gallons proof spirits each twenty-four hours from corn; bushels of grain, producing gallons of proof spirits each twenty-four hours from rye, and

gallons from molasses, by closing the following-numbered fermenting tubs, changing the fermenting period from 48 hours to 48 hours, by varying the strength of the beer from 45 gallons per bushel to 45 gallons per bushel.*

Working capacity, in gallons.				Working capacity, in gallons.				Working capacity, in gallons.			
No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.	No.	Corn.	Rye.	Molasses.
10	4,670										
14	4,588										
	9,258										

Total working capacity of tubs in use after the change, in gallons, from corn, 28,006.

Total working capacity of tubs in use after the change, in gallons, from rye, .

To take effect on and after May 4th, 1876.

I will thank you to send the proper officer to close the tubs specified.

(Signed) G. H. RABE,
Distiller.

I certify that on this the 4th day of May, 1876, I visited the distillery of G. H. Rabe, No. 2, and caused fermenting tubs Nos. 10 & 14 to be closed by closing beer-troughs of same in accordance with the above notice.

(Signed) E. C. URNER,
Deputy Collector.

COLLECTOR'S OFFICE, 1 DISTRICT OHIO,
May 4, 1876.

I certify that the above application was complied with on May 4, 187 , by closing the fermenting tubs specified, changing the fermenting period, or authorizing the setting of beer at the strength specified, and that the capacity of said G. H. Rabe's distillery No. 2 is, from that date, fixed at 207.45 bushels of grain, and 829.80 gallons of proof spirits each twenty-four hours from corn; bushels of grain and gallons of proof spirits each twenty-four hours from rye, and gallons from molasses, in accordance with survey of said distillery made by E. C. Urner Jan'y 12, 1876.

(Signed) LEWIS WEITZEL,
Collector.

19 Whereupon defendant tendered this his bill of exceptions, and prayed that the same might be signed, sealed, and allowed and made part of the record, which is done accordingly.

In testimony whereof I have hereunto set my hand and seal this 11th day of January, A. D. 1878, being one of the days of said October term.

[SEAL.] PHILIP B. SWING,
Judge of the District Court of the United States for the Southern District of Ohio, sitting as Circuit Judge.

* NOTE.—Forty-five gallons of beer is the maximum number representing a bushel in the fermenting tubs, except in sour-mash distilleries, where sixty gallons is allowed. Changes in capacity by changing the fermenting period or varying the strength of beer will be allowed only when the notice is accompanied by a new survey.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case of Gerhard Rabe vs. Lewis Weitzel as the same remain and are on file in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 29th day of January, A. D. 1878, and in the 102nd year of the Independence of the United States of America.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court S. D. O.

Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States within and for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea, which is in the said circuit court before you between Gerhard H. Rabe, plaintiff, and Lewis Weitzel, defendant, a manifest error hath happened to the great damage of the said defendant, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington on the second Monday in the month of October next in the said Supreme Court then and there to be held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the 102nd.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. C. C. S. D. O.

UNITED STATES OF AMERICA, *ss:*

To Gerhard H. Rabe, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the sixth judicial circuit and southern district of Ohio, wherein Lewis Weitzel is plaintiff, and you, Gerhardt H. Rabe, are defendant in error, to show

cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this fourth day of March, in the year of our Lord one thousand eight hundred and seventy-eight, and in the 102nd year of the Independence of the United States of America.

[SEAL.]

PHILIP B. SWING,
District Judge holding the Ciruit Court of the U. S. for the Southern District of Ohio.

I hereby acknowledge service of the foregoing citation for Gerhard H. Rabe, the defendant in error.

Cincinnati, March 5, 1878.

WARREN M. BATEMAN,
Att'y for Defendant in Error.

(Indorsement on cover): No. 401. Lewis Weitzel, collector of internal revenue, plaintiff in error, vs. Gerhard H. Rabe. S. Ohio C. C. U. S. Filed 12th April, 1878.